No. 85-598

(2)

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC.
and GRUMMAN CORPORATION,

Petitioners,

—v.—

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

FREDERICK A. O. SCHWARZ, JR.,
CORPORATION COUNSEL OF THE
CITY OF NEW YORK
100 Church Street
New York, New York 10007
(212) 566-3300

Attorney for Respondent
The City of New York

LESLIE GORDON FAGEN
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000

Attorneys for Respondents
New York City Transit Authority,
Manhattan and Bronx Surface
Transit Operating Authority
and Port Authority of New York
and New Jersey

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Should this Court issue a Writ of Certiorari to review the New York State courts' factual finding on an extensive record that the parties to the contracts at issue did not intend to arbitrate the claims in this action by virtue of their use of a boilerplate government contract "Disputes Clause" where:

(a) the record made clear that, in rejecting a proposed routine arbitration clause in contract negotiations in favor of the standard Disputes Clause, the parties had adopted fifty years of pre-existing case law, including this Court's controlling opinion in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), holding that the Clause does not provide for arbitration, but is "limited to pre-delivery claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief," 384 U.S. at 405;

(b) the United States Urban Mass Transportation Administration, the agency which petitioner Grumman says drafted the Disputes Clause for the Contracts at issue, (i) has ruled in another Grumman litigation relating to the Chicago Regional Transportation Authority's Model 870 buses that the Clause was never intended to cover any and all disputes between the parties, (ii) has declined to adjudicate such disputes and (iii) has been upheld on these rulings by the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit; and

(c) the New York courts' decisions, which are factual in nature and consistent with well-settled case law including this Court's decision in *Utah Construction*, conflict with no decisions of this Court or any other?

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THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Respondents The City of New York, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority and Port Authority of New York and New Jersey hereby oppose the petition of Grumman Ohio Corporation, Grumman Allied Industries, Inc. and Grumman Corporation (collectively "Grumman") for a Writ of Certiorari to the Court of Appeals of the State of New York.

COUNTER-STATEMENT OF THE CASE

Background

This is a case concerning claims for fraud, material breach of contract, breach of implied warranties, and negligent misrepresentation.

Respondents intend to prove in a court of law that, in a $92 million transaction in 1979, Grumman deliberately and knowingly conspired to sell unsafe and unreliable transit equipment—the defective Grumman Flxible Model 870 bus—for use by the riding public of the City of New York. Respondents' allegations are based *inter alia* on Grumman's *own* recently disclosed internal documents and admissions including previously secret pre-production test reports concluding that the Model 870 bus destined for the streets of New York suffered from defects which "could lead directly to passenger or driver injury." Complaint, R. 75.*

The result of Grumman's wrongful conduct is that, on February 7, 1984, the New York City Transit Authority permanently withdrew its fleet of 850 Model 870 buses because, after four years of repeated safety and other Model 870 bus defects, multiple fleetwide recalls and ineffective fixes, it could no longer assure the riding public of the City of New York of the safety of Grumman's bus. Id.

On May 9, 1984—not coincidentally, on the day Grumman learned that respondents intended to sue—Grumman's counsel purported to invoke the "Disputes Clause" of the three Model 870 contracts (the "Contracts") to the controversy between the parties. R. 31.

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* Citations in the form R. ____ are citations to the Record on Appeal in the Appellate Division below.

The Disputes Clause and the Parties' Intentions in Adopting It

The parties adopted the Disputes Clause as part of the Contracts in 1979 in consultation with the United States Urban Mass Transportation Administration ("UMTA"). They opted for this half-century old boilerplate clause found in government procurement contracts only after the Model 870 contractor's efforts to employ a routine American Arbitration Association arbitration provision as an alternative were rejected.

In February 1977, Flxible, the predecessor of Grumman Flxible, had proposed a broad arbitration clause to determine "any and all disputes" under rules similar to those set by the American Arbitration Association.[1] But the suggestion for an arbitration clause was rejected in favor of the standard government contract Disputes Clause despite Flxible's concern at the time that the Clause provided "insufficient protection to the Contractor" in offering so limited a scope of review. *Statement of Rationale for UMTA Response to Manufacturer Comments and Requests on April 4, 1977 Issue of ADB Specifications at p. 4*, R. 834.

The resulting Disputes Clause was not written like an arbitration clause. Far from an arbitration provision, the Clause is

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1 It wrote as follows:

> XVIV. *SECTION 2.16 DISPUTES (Page I-27)*
>
> A standard disputes provision should be developed and included within the Transit Coach Procurement Requirements to promote uniformity from state to state. Flxible can discuss this Section further and *proposes that procedures be established similar to those of the American Arbitration Association*. It may be appropriate that an APTA [Association of Public Transit Authorities] committee or panel be selected under ground rules similar to the American Arbitration rules *to determine any and all disputes*. In any event, further discussion and drafting would be needed to provide a suitable disputes clause acceptable to everyone.
>
> The Flxible Company, *Review of Baseline Advanced Design Transit Coach Specifications*, February 1, 1977 at p. 15 (emphasis added), R. 832.

subject to an exception on its face, not once mentions the word "arbitration," sets no standards for arbitration such as American Arbitration Association rules, appoints a blatantly partial rather than impartial party to resolve disputes, *i.e.*, here the contracting officer of the Transit Authority (who is the purchaser) and UMTA (who funded the purchase), and provides for only limited finality of decisions.

In agreeing to the Disputes Clause in 1979 (in nearly identical language to such clauses used in prior procurement contracts), the parties to the Contracts adopted fifty years of pre-existing case law construing the Clause, including the leading Supreme Court decision, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966). That case law uniformly holds that the Disputes Clause is not an all-encompassing arbitration provision but is "limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief. . . ." *Utah Construction*, 384 U.S. at 405. Indeed, no court has ever applied the Clause as if it were an arbitration provision.

In this case, the parties intended the Clause to apply solely to disputes redressable under other specific Model 870 contract provisions such as those relating to written change orders, change order procedures relating to contract specifications, delays in delivery, notifications of delay and requests for extensions. Each of these many provisions expressly refers to decisions by the "contracting officer" named by the Disputes Clause. The parties did not intend to subject claims such as those made by respondents in their complaint to adjudication by the contracting officer.

As the New York Supreme Court ruled in rejecting Grumman's arguments:

> Adopting the defendants' position would mean submitting complex factual and legal issues relating to violations of the U.C.C., fraud and punitive damages to a contracting officer. *The ultimate question is whether the parties*

> *intended this type of controversy to be submitted to a "Contracting Officer." The answer is clearly No.*

Petition at 6(a) (emphasis added).

Grumman's Petition

Nevertheless, in its Petition, Grumman now argues in effect that the parties' contractual intentions in 1979 were to "arbitrate." Without any factual basis, and although it argued much to the contrary to the New York Supreme Court below and to three federal courts in another Model 870 litigation, it now seeks to establish that the parties intended here to reject *Utah Construction* and employ an unprecedented application of the Disputes Clause as an arbitration clause.

Sixteen New York State judges have reviewed Grumman's argument. All have rejected it based on the factual findings as to the parties' intentions in adopting the Disputes Clause in 1979.

As we now show, Grumman's Petition does not raise any significant question of federal law or identify any determination below in conflict with applicable decisions of this Court or any other to justify the granting of certiorari. It should be denied.

REASONS FOR DENYING THE WRIT

I

THE NEW YORK COURTS' DECISIONS BELOW DETERMINED, ON THE SPECIFIC FACTS OF THIS CASE, THAT THE PARTIES' CONTRACTUAL INTENT WAS NOT TO SUBMIT CLAIMS SUCH AS RESPONDENTS' CLAIMS TO "ARBITRATION"

A. The New York Courts Found that As a Factual Matter the Parties Did Not Intend to Arbitrate

The New York courts, on the specific facts of this case and an extensive record including over 900 pages of factual materials, decided that the parties to the Contracts did not intend to "arbitrate" or otherwise extra-judicially resolve the claims in the complaint by virtue of their use of the boilerplate government contract Disputes Clause. Nevertheless, Grumman contends that the New York courts deprived it of "Federal Arbitration Act rights" in a way which conflicts with federal case law. Petition at 7-10.

In reality, any rights conferred upon Grumman by the Federal Arbitration Act (the "FAA") cannot be violated by a finding that the parties did not intend to arbitrate. The FAA was enacted first and foremost to enforce agreements. *Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S. Ct. 1238, 1242 (1985). It confers no new rights, except the enforcement of rights bargained for in a contract. *See* 65 Cong. Rec. 1931 (1924) (quoted in *Dean Witter Reynolds*, 105 S. Ct. at 1242 n.7.)

As this Court stated in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967), quoting from the language of section 4 of the FAA:

> [T]he federal court is instructed to order arbitration to proceed *once it is satisfied that 'the making of the agreement for arbitration* or the failure to comply [with the arbitration agreement] *is not in issue.'*

(Emphasis added) (footnote omitted). *See Dean Witter Reynolds, Inc.*, 105 S. Ct. at 1242. The identical standard was applied by the courts below. *See* Petition at 4a.

As demonstrated below, the New York courts' factual determinations as to the parties' intentions (after giving full consideration to the FAA) do not conflict with any other judicial decision and are unworthy of this Court's review. *See United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

1. In Entering Into the Model 870 Contracts and Agreeing to the Disputes Clause, the Parties Adopted Fifty Years of Pre-Existing Case Law, Including the Rulings of this Court, Which Demonstrate that the Disputes Clause Is Not an Arbitration Clause

In entering into the Model 870 Contracts and agreeing to the Disputes Clause, the parties adopted fifty years of pre-existing case law which had dispositively construed the Clause. That case law, including a conclusive ruling of this Court, holds that the Disputes Clause provides only limited authority to government contracting officers to expedite the resolution of various expressly defined contract issues rather than to arbitrate any and all issues relating to the contract's subject matter.

In *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), the Government took the very position argued by Grumman here: that the Disputes Clause is an arbitration-type provision which applies to any factual or other dispute relating in any way to a procurement contract.

This Court disagreed.

The Court, relying on "an examination of uniform, continuous, and long-standing judicial and administrative construc-

tion of the disputes clause, both before and after the contract here was executed," stated that:

> [W]hen the parties signed this contract in 1953, neither could have understood that the disputes clause extended to breach of contract claims not redressable under other clauses of the contract.

384 U.S. at 404-05 (citing, *inter alia*, *Phoenix Bridge Co.* v. *United States*, 85 Ct. Cl. 603, 629-630 (1937)).

The Supreme Court identified claims "redressable under other clauses of the contract" as claims seeking relief under contract provisions (other than the Disputes Clause itself) which set contractual mechanisms for adjustment. As the Court held:

> When the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract.

384 U.S. at 404 n.6. The Court ruled that, far from an arbitration provision:

> [T]he disputes clause [is] limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief . . .

Id. at 405.

In response to the government's arguments concerning the language of the Disputes Clause, the Supreme Court held, in words particularly relevant here:

> [E]ven if, as an original matter, the language of the disputes clause might have been susceptible of the interpretation urged by the Government, the restrictive meaning of the words 'arising under this contract' had *long since been established when these parties used them in 1953. The question before us is what the parties*

> *intended*, not whether the construction on which they relied was erroneous.

384 U.S. at 407 (emphasis added).

This was the existing case law construction of the Disputes Clause when the parties to the Contracts agreed to the Clause (having earlier rejected an arbitration clause proposed by the contractor). No court prior to 1979 had held (or to date has held) that the Disputes Clause should be applied in the same manner as an arbitration clause. If the "restrictive meaning" of the Clause, in the words of *Utah Construction*, "had long since been established . . . in 1953," it had become even more established in 1979 when plaintiffs agreed to purchase Model 870 buses from Grumman. *See Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d 1096, 1103 (D.C. Cir. 1969) ("The restrictive meaning of the words 'arising under this contract' had long since been established when these parties used them, and upon that meaning the parties were entitled to rely in the absence of some clear indication that the words were to take on a wholly different significance.").

As the Supreme Court noted in *Utah Construction*, "the question . . . is what the parties intended," 384 U.S. at 407, and that question can only be resolved in light of the well-established meaning of the Clause. The parties in this case, as the courts ruled below, by adopting the exact language of the Disputes Clause in use for nearly fifty years, intended to adopt the limited construction of the Clause employed by every single court which has addressed it.

In applying the half-century of Disputes Clause case law, other courts have been faced with the argument, made by Grumman here, that the Clause is an arbitration clause within the meaning of the FAA. The courts have flatly rejected the argument. In *Moran Towing & Transportation Co.* v. *United States*, 290 F.2d 660 (2d Cir. 1961), and in *Aetna Insurance Co.* v. *United States*, 327 F. Supp. 865 (E.D. La. 1971), the courts held that the standard dispute clause "is not a situation covered

by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, as the Disputes Clause . . . does not provide for arbitration." *Moran Towing*, 290 F.2d at 662. As stated by the Second Circuit in *Moran Towing*, "the Disputes Clause here does not provide for arbitration, or for the appointment of arbitrators." *Id.* at 662. Similarly, in *Aetna*, the Court observed: "The 'disputes provision' is not an arbitration procedure. Unlike arbitration, it does not contemplate submission of a contested issue to an impartial arbiter." 327 F. Supp. at 866.

2. The Parties Intended *Utah Construction* to Apply Even Though the Federal Government Was Not a Party to the Model 870 Contracts

Undaunted, Grumman contends that *Utah Construction* and other Disputes Clause case law was not intended to apply here simply because, in contrast to the facts in *Utah Construction*, the federal government was not a party to the Model 870 Contracts. Petition at 4. But there is no factual or legal basis for this contention and the evidence demonstrates the contrary. Indeed, in 1977, when UMTA rejected the contractor's proposal for an arbitration provision in favor of a Disputes Clause, it explicitly stated that its choice was "based on procedures for handling disputes in Federal Government contracts . . . ." *Statement of Rationale For UMTA Response To Manufacturer Comments And Requests On April 5, 1977 Issue Of ADB Specifications* at 4. R. 834.

Moreover, in applying the Disputes Clause, the case law does not make Grumman's distinction between contracts in which the federal government is or is not a party. In fact, certain of the decisions applying the Disputes Clause in accordance with *Utah Construction* and cited extensively by Grumman, were disputes arising from federally funded contracts in which the federal government was not a party. Thus, in *Bethlehem Steel Corp.* v. *Grace Lines, Inc.*, 416 F.2d 1096, the court was faced with a government-funded contract between private parties which included the standard Disputes Clause. The court there

applied *Utah Construction* and other Disputes Clause decisions, not arbitration principles, to determine the scope of the clause. The same is true in *RTA* v. *Grumman Flxible Corp.*, 532 F. Supp. 665 (N.D. Ill. 1982).

Lastly, Grumman itself argued before the New York Courts below in this action and other courts in other Model 870 litigation that *Utah Construction* and its progeny applied to the Model 870 Disputes Clause. For example, Grumman contended before the New York Supreme Court, not that the Disputes Clause should be treated differently from the standard federal clause, but that:

> The Disputes Clause is identical in every material respect to the standard federal government contracts Disputes Clause, and UMTA specifically intended, by use of the standard Disputes Clause, *to adopt the disputes resolution procedures applicable to federal government contracts.*

Grumman Moving Br. at 7 (emphasis added). It further argued, citing as its first case *Utah Construction*, that the fifty years of Disputes Clause case law governed the controversy between the parties:

> A large body of United States Supreme Court decisions also holds that the typical Disputes Clause in federal government contracts, which is identical to the Disputes Clause in the NYCTA contracts, "requires utilization of the administrative procedures contractually bargained for."

Grumman Moving Br. at 21 (quoting *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 428 (1966)).

Similarly, in the series of Model 870 litigations between Grumman and the Chicago Regional Transportation Authority pending in the United States District Court for the Northern District of Illinois and the District of Columbia (the "*RTA* litigation"), Grumman also advanced *Utah Construction* as controlling and contended before the District of Columbia

Circuit Court of Appeals that "the parties themselves, must be deemed to have intended to incorporate into the [Model 870] contract the procedures mandated by this unbroken line of court decisions." Grumman Appeal Brief, *Grumman Ohio Corp.* v. *Dole*, Docket No. 84-5543 (D.C. Cir.) at 43.

Grumman's failure to provide any factual or legal basis for the argument that the Disputes Clause in the Model 870 Contracts was meant to be applied differently from every other Disputes Clause which preceded it and its own varying statements to other courts as to the parties' intentions in adopting the Clause demonstrate that the New York courts correctly ruled in respondents' favor.

3. The Urban Mass Transportation Administration, Which Grumman Says Drafted the Model 870 Contracts, Has Ruled that the Model 870 Disputes Clause Was Never Intended to Apply to Claims Such as Those Alleged Here and Its Refusal to Adjudicate Model 870 Claims Has Been Upheld by the District of Columbia Federal Courts

As the New York Supreme Court noted below, the United States Urban Mass Transportation Administration ("UMTA"), the very agency Grumman contends was charged with drafting and administering the Disputes Clause, has rejected Grumman's view of the parties' intentions in agreeing to the Disputes Clause.[2]

In connection with the *RTA* litigation, the UMTA Administrator defined the parties' intentions in agreeing to the Disputes Clause:

> [The Disputes Clause] was never intended to apply to issues relating to performance or damages arising out of post-delivery problems.

March 30, 1983 Letter from UMTA Administrator to Grumman Flxible at 2-3, R. 778-80. In his statement, the Adminis-

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2 UMTA's practice in this matter is entitled to great weight. One of the factors upon which this Court relied in *Utah Construction* was the practice of relevant federal agencies. 384 U.S. at 407-412.

trator distinguished between issues "primarily Federal in nature," such as the meaning of contract specifications, which come within the clause, and issues "primarily local in nature," such as post-delivery performance, which do not. *Id.*

In the *RTA* litigation, UMTA subsequently ruled that RTA's claims for damages due to repairs on its Model 870 buses and other post-delivery issues were not within the Clause. UMTA stated:

> [I] would emphasize the limited nature of my review, for this appeal does not concern the type of dispute for which the Disputes Clause was intended. Rather, *this appeal concerns matters to be resolved between the two parties in a court of competent jurisdiction under applicable State law, without UMTA involvement or reference to the Disputes Clause.*

June 17, 1983 letter from UMTA to Grumman Flxible (emphasis added), R. 785-88.

Grumman responded by suing UMTA to require it to act under the Disputes Clause in the *RTA* matter. But UMTA's position was upheld by the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit which rejected the Grumman argument that UMTA was legally obligated to resolve Model 870 disputes. *Grumman Ohio Corp.* v. *Dole*, 776 F.2d 338 (D.C. Cir. 1985).[3]

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3 In its Petition (at 6), Grumman argued that, if the D.C. Circuit ruled in its favor in the *RTA* litigation, the granting of certiorari in this matter would be indicated. However, the Circuit Court ruled against Grumman stating that:

> [A]t bottom, it makes no sense whatever in the real world to force UMTA to preside over battles in which federal interests are minimal at best.

Grumman Ohio Corp. v. *Dole*, 776 F.2d at 345 (1985). In the present case, the federal government no longer has any interests: its financial interest in respondents' Model 870 buses under the terms of the applicable federal grants was transferred to other property after the Model 870 fleet was withdrawn from service.

In *Grumman Ohio* v. *Dole*, the Court of Appeals stated that in interpreting the Disputes Clause "the intent of the parties obviously controls" 776 F.2d at 349 n.10 and that any determination concerning the parties' intention to "arbitrate" should be made by the trial court, *id.* at 348. Of course, the trial court in this case has already made such a factual determination.

Notwithstanding the holdings in the *RTA* litigation, Grumman argues here that the New York Courts erred because in denying Grumman's motion they relied on UMTA's "unwillingness" to serve as an "arbitrator" to resolve the present dispute. Petition at 10. But Grumman has misconstrued the New York courts' decisions. They did not decline to direct a supposed "arbitrator" to serve or to appoint a substitute simply in light of his unwillingness to serve. Rather, the New York courts relied, *inter alia*, upon the highly probative evidence as to the parties' intentions when they agreed to the Disputes Clause, furnished by UMTA's own statement concerning the clause.

B. Under Fifty Years of Disputes Clause Case Law, Respondents' Claims Are Not Subject to Partial Adjudication by a Contracting Officer

As a fall back to its "arbitration" contentions, Grumman argues that under *Utah Construction* the New York courts erred by not directing at least some of the fact issues in this litigation to the Disputes Clause contracting officer. Grumman cites arbitration case law in support of its argument. Petition at 10.

However, under *Utah Construction* and the applicable Disputes Clause case law, it is not enough that causes of action raise some fact issue relating to the contract to require a party to submit those claims (or that fact issue) to a contracting officer. Unless complete relief for any claim can be afforded to the parties under the provisions of the relevant contract, the Disputes Clause has no applicability to that claim whatsoever.

This Court in *Utah Construction* adopted the Court of Claims' repeatedly expressed view that:

> [T]o the extent complete relief is available under a specific contract adjustment provision . . . the controversy falls within the disputes clause . . . . *[W]hen only partial relief is available . . . the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract . . . .*

Id. at 402 (emphasis added). *Utah Construction* has consistently been read to require that a Court may not defer to the administrative procedures afforded by the Disputes Clause unless "the controversy is fully redressable under a provision of the contract other than the disputes clause itself." *Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d at 1101.

There appears to be no serious dispute here that, if *Utah Construction* applies, none of respondents' claims in this litigation would be fully governed by the Disputes Clause. In the Complaint, respondents allege fraud, conspiracy to defraud, material breach of contract, negligent misrepresentation, and breach of implied warranties and seek unliquidated damages. They also seek relief against two Grumman defendants, Grumman Corporation and Grumman Allied, listed below, *neither of whom is even a party to the Contracts.* Under *Utah Construction* and a legion of other decisions cited below, such claims and any claims seeking such relief cannot be fully resolved under the Contracts and, accordingly, the Disputes Clause does not apply.[4]

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4 Fraud cases: *United States* v. *United States Cartridge Co.*, 78 F. Supp. 81, 83-84 (E.D. Mo. 1948) ("The parties never contracted that if defendant in the execution of a contract committed fraudulent acts, . . . liability resulting therefrom would be a matter of settlement by the Contracting Officer, or arbitration."); *International Potato Corporation* v. *United States*, 161 F. Supp. 602, 604-605 (Ct. Cl. 1958) (whether the contractor had conspired with non-signatories to defraud the government was not within the standard disputes clause); *United States* v. *Medico Indus.*, 685 F.2d 230, 232 (7th Cir. 1982) ("[A]s we had neither authority nor duty to render a decision as to an allegation of fraud, the contracting officer in this appeal had no authority or

Consistent with this case law, the New York courts below held that "[t]he action should be judicially determined unless all issues can be completely resolved administratively." Petition at 6a.

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duty to render a decision . . ."); *Jefferson Construction Co.* v. *United States*, 392 F.2d 1006, 1012 (Ct. Cl.), *cert. denied*, 393 U.S. 842 (1968) (parties cannot reasonably be said to have anticipated wrongdoing and to have agreed in advance under *Utah Construction* to forego judicial remedies in favor of a contract mechanism to vindicate such wrongdoing).

Negligence cases: *Aetna Insurance Co.* v. *United States*, 327 F. Supp. 865, 867 (E.D. La. 1971) ("[n]o 'specific contract adjustment provision' with regard to" claim of negligence).

Breach of Contract cases: *United States* v. *Utah Construction Co.*, 394 U.S. at 405 ("pure breach of contract claims" need not be "process[ed] . . . through the disputes machinery."); *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 506 n.2; *United States* v. *Reisman*, 611 F.2d 325, 329 (9th Cir. 1980) (recourse to the Contracting Officer was not "a condition precedent to a suit in court by the United States to recover damages for a total breach of the contract"); *Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d at 1101 ("claims for breach of contract . . . may be litigated in a court of competent jurisdiction without previous resort to [the disputes clause procedure]").

Breach of Warranty cases: *Ekco Products Co.* v. *United States*, 312 F.2d 768, 773 (Ct. Cl. 1963) (a claim for breach of implied warranty of suitability for intended purpose was "a claim for unliquidated damages over which . . . 'the Contracting Officer has no jurisdiction' ") (quoting Defendant's Brief); *Luria Bros. & Co.* v. *United States*, 369 F.2d 701, 709 (Ct. Cl. 1966) (contractors may bring judicial suit for damages resulting from the government's breach of implied warranties as to the accuracy of specifications furnished to the contractor).

Claims for Unliquidated Damages: *Bird & Sons, Inc.* v. *United States*, 420 F.2d 1051, 1056 (Ct. Cl. 1970) (claims seeking unliquidated damages do not fall within the clause); *Universal Ecsco Corporation* v. *United States*, 345 F.2d 586, 588 (Ct. Cl. 1965) ("conventional damage claims" not within clause).

II

THE NEW YORK COURTS' DECISIONS DO NOT CONFLICT WITH DECISIONS OF THIS COURT, OR ANY OTHER DECISIONS

Assuming (against all the evidence) that there was an agreement to arbitrate, Grumman advances four purportedly "conflicting" arbitration opinions by this Court—*Dean Witter Reynolds Inc.* v. *A. Lamar Byrd*, 105 S. Ct. 1238 (1985), *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967)—against which it criticizes the New York Courts' decisions. Petition at 8.

But these opinions advanced by Grumman simply do not concern the Disputes Clause or the fifty years of case law interpreting the Clause, nor indeed the issue of whether or not the parties made an agreement to arbitrate. In each of these four cases there was no dispute that the parties had agreed to routine arbitration clauses.[5] Accordingly, they do not conflict

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5 In *Dean Witter Reynolds Inc.* v. *A. Lamar Byrd*, the parties agreed that "[a]ny controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration." 105 S. Ct. at 1239.

In *Southland Corp.* v. *Keating*, the arbitration provision, the nature and coverage of which the parties did not contest, read:

> Any controversy or claim arising out of or relating to this Agreement or the breach hereof *shall be settled by arbitration in accordance with the Rules of the American Arbitration Association*. . . .

465 U.S. at 4 (emphasis added).

In *Moses H. Cone Mem. Hosp.* v. *Mercury Construction Co.*, the applicable provision read:

> All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, . . . *shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association* then obtaining unless the parties mutually agree otherwise.

460 U.S. at 5 (emphasis added).

(Footnote continued on following page)

with the New York Courts' decisions as to the parties' intentions in this case.

In a further effort to identify "conflicting" decisions, Grumman cites *Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d 1096, and a District Court decision from the Northern District of Illinois in the *RTA* litigation. Petition at 11-13. These decisions however, were expressly considered in the decisions of the New York courts below and are in no way in conflict with them.[6]

Thus, the *Bethlehem Steel* court, far from defining the Disputes Clause as an arbitration clause, ruled:

> That phrase—"arising under this contract"—has a lengthy history, throughout which it has commanded widespread acceptance as an unyielding limitation on administrative reference to disputes that *can be fully remedied* under some stipulation of the contract . . .

Finally, in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, (1967), the clause read:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, *shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association.*

388 U.S. at 398 (emphasis added).

6 Indeed, while Grumman contends here that the *Bethlehem Steel* case is "conflicting" because it supposedly requires a reference of this dispute to the contracting officer, it argued in the *RTA* litigation before the Illinois District Court that the *Bethlehem Steel* case stood for the proposition that:

> 'claims which are adjustable under contractual provisions must be submitted to the administrative determinations prescribed by the contract, while claims for breach of contract—those not adjustable in that fashion—may be litigated in a court of competent jurisdiction without previous resort to that procedure' 416 F.2d at 1101. *Flxible and RTA apparently have no disagreement with this principle . . . .*

Grumman Reply Brief, *RTA* v. *Grumman Flxible Corp.* Docket No. 81C6974 (N.D. Ill.) at 4 (emphasis added).

416 F.2d at 1102 (emphasis added) (footnote omitted). The Circuit Court reversed the district court's stay of proceedings under the Disputes Clause only because the deficiencies of the lower court's record including the absence of evidence and findings of fact left the appellate court "unable to say, as the District Court did, that 'as a matter of law' the disputes clause does not encompass [Grace's] claim." 416 F.2d at 1104. The court stated that, in the exercise of its equitable powers, the district court should "enlist the aid" of the Maritime Administration, which was determining some of the parties' disputes in any event and had expressed a willingness to hear all of the disputes, while reserving the court's power to make the final decision on the applicability of the Clause. 416 F.2d at 1106, 1109.

Here, of course, there is a full record below including the Contracts and all their provisions upon which the New York courts relied in finding that the claims in plaintiffs' complaint did not fall with the Disputes Clause. Further, the relevant administrative agency, UMTA, is in no way presently involved in this dispute and has stated that it has no intention of adjudicating Model 870 disputes under the Clause. UMTA has been upheld by the Courts in its decision. Accordingly, the *Bethlehem Steel* case is likewise not in conflict with the New York courts' decisions.

The Illinois District Court opinion in the *RTA* litigation also provides no support for Grumman's Petition. In that action, RTA had invoked contract warranty procedures and required Grumman Flxible to repair the undercarriages of its buses. After the repair, RTA brought suit contending that the Grumman repairs did not make it whole and sought damages for storage, security services and leasing replacement buses during the repairs. The Court dismissed the action without prejudice because it found that RTA's claims concerning warranty repairs were "anticipated" by the parties and thus *might* be deemed redressable under the warranty repair provisions, a question it expressly left to UMTA which at that time had not yet ruled on

the RTA claims. *RTA* v. *Grumman Flxible Corp.*, 532 F. Supp. at 666 & n.2.

Such a decision is not "conflicting" with the New York Courts' decisions:

First, after the subsequent decisions by the federal courts in the District of Columbia upholding UMTA's construction and application of the Disputes Clause, the *RTA* litigation is now, like this one, in full-blown litigation, not arbitration.

Second, in the *RTA* decision, based upon Grumman's own argument at the time, the court viewed *Utah Construction* and its progeny as controlling and did not regard the Disputes Clause as an arbitration provision covering every dispute which related in any way to the Model 870 contract.

Finally, it was because RTA had willingly availed itself of the contract warranty repair procedures to require undercarriage fixes that the *RTA* court believed that RTA's claims for damages on top of Grumman's repairs were "anticipated" and might have been intended to be "redressable" solely under the contract. *RTA* v. *Grumman Flxible Corp.*, 532 F. Supp. at 666 & n.2.

Here, plaintiffs have not sought to apply the contract warranty repair procedures. Indeed, unlike RTA, the Transit Authority has permanently withdrawn its Model 870 buses from service because it believes they are unsafe and fundamentally defective and because it has no obligation to submit to endless purported "fixes"—a situation obviously not "anticipated" by the parties to the Contracts and, under *Utah Construction*, not "redressable" under their terms.

CONCLUSION

For the foregoing reasons, the requested writ of certiorari should be denied.

Dated: New York, New York
December 26, 1985

Respectfully submitted,

FREDERICK A.O. SCHWARZ, JR.

CORPORATION COUNSEL OF
THE CITY OF NEW YORK
Attorney for Respondent
The City of New York
100 Church Street
New York, New York 10007
(212) 566-3300

LESLIE GORDON FAGEN

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
Attorneys for Respondents
New York City Transit Authority,
Manhattan and Bronx Surface
Transit Operating Authority
and Port Authority of New York
and New Jersey
345 Park Avenue
New York, New York 10154
(212) 644-8000